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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD WILLIAMS,

Defendant and Appellant.

F076695

(Super. Ct. No. MF012516A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Nicholas Seymour, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Franson, Acting P.J., Snauffer, J. and DeSantos, J.

INTRODUCTION

Appellant Harold Williams contends the trial court erred in failing to instruct the jury sua sponte on the defense of necessity. He also contends defense counsel rendered ineffective assistance by failing to request the necessity instruction. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In an information filed on June 21, 2017, Williams was charged in count 1 with violating Penal Code¹ section 368, subdivision (b)(1), elder abuse; in count 2 with violating section 245, subdivision (a)(4), assault likely to produce great bodily injury; and in count 3 with violating section 243, subdivision (d), battery resulting in serious bodily injury.

Williams entered not guilty pleas to the charges. Brenda Williams² testified at trial she is the mother of Williams and was 69 years old; Williams was 47 years old. On May 29, 2017, Brenda was at home. She was cleaning her 2015 Subaru Outback because she was planning to sell the car. Williams was helping clean the car.

The tailgate on the car would close by itself, according to Brenda, and Williams was holding the tailgate door open while Brenda vacuumed the rear portion of the car. The vacuum was behind Brenda's feet. At one point, Williams nudged her and said, "[G]et off, get out, get out, it's coming down, I can't hold it anymore."

Brenda had difficulty moving because the hose of the vacuum was wrapped around her. Brenda testified Williams was "pretty rough" about trying to move her, so she "whacked" him with the vacuum wand and said he was "crazy trying to push me out of the way like that." The wand on the vacuum was about three feet long.

¹ References to code sections are to the Penal Code.

² Because this witness shares the last name of Williams, we refer to her by her first name to avoid confusion.

Williams started cussing at her and calling her names like “old c***.” She hit him with the vacuum wand again on his arm, forgetting that he had recently broken his arm and it had not “quite healed well.” Williams responded by hitting Brenda on her left cheek; she “went down and hit the concrete with [her] head.” Williams continued to hit her as she lay on the concrete.

When Williams stopped hitting her, Brenda had difficulty getting up from the ground. She was holding her hand because it hurt, and she was “just hurting all over.” Williams did not help her get to her feet or render any type of aide.

Later that day, Brenda told her husband she needed to have her hand checked; she thought it was broken. Brenda went to an urgent care center for treatment. Brenda had a bruise on her left cheek where Williams hit her and knocked her down. Her left ankle was scratched. Brenda’s right arm had bruises and a scab on the elbow. Her left arm had bruises on both sides.

Brenda was in “severe pain” the night of the incident and went to a hospital, where X-rays were taken of her arm. After the x-rays were taken, her arm was placed in a cast and sling. The injury to her arm and face hurt for two to three weeks.

Williams testified in his own defense. He testified he was helping his mother, Brenda, when the hatch door of the car “came down real swiftly and it jammed my fingers.” He was trying to hold the hatch up with his other hand and used his hip to push Brenda to the side, away from the hatch area.

According to Williams, Brenda responded by wielding the vacuum’s wand like a baseball bat. He claimed Brenda was “beating” him with the vacuum wand repeatedly and he could no longer hold the hatch door open. After his mother was on the ground, he said, “[W]hat the f*** is wrong with you? You old c***.” Williams said he “was spitting my teeth out and I could not see from being hit in the eyes.”

Williams testified Brenda hit him “about 20 times in the face and in my arm and enough where she bent the metal in my arm.” Williams claimed he had permanent eye damage from being hit in the face with the vacuum wand by Brenda.

He denied punching his mother in the cheek or hitting her while she was on the ground. Williams testified that Brenda hit herself in the face; she was “hitting herself saying, I will show you, you old f***** c***.” Williams claimed Brenda punched herself in the face four or five times. Williams also claimed the injury to Brenda’s hand or arm and her bruises occurred two days before they were cleaning the car; that was why he was helping her.

The jury found Williams guilty of the count 3 offense, battery in violation of section 243, subdivision (d). The trial court declared a mistrial as to counts 1 and 2.

At the December 8, 2017 sentencing hearing, the trial court noted that Williams had numerous prior convictions and had served prior prison terms. The trial court imposed the upper term of four years for the current offense. The abstract of judgment, reflecting the sentence imposed by the trial court, was filed on December 8, 2017. That same day, Williams filed a notice of appeal.

DISCUSSION

Williams contends the trial court had a sua sponte duty to instruct the jury on the defense of necessity and the evidence supported such an instruction. He also contends defense counsel rendered ineffective assistance by failing to request an instruction on the defense of necessity.

Factual Circumstances

Williams’s contention that a necessity instruction should have been given is twofold: (1) the trial court had a sua sponte duty to instruct on necessity, and (2) defense counsel was ineffective for failing to request a necessity instruction. Neither contention prevails because the evidence did not support a necessity instruction.

Williams's appellate brief argues he produced substantial evidence that Brenda would have been injured if he did not push her away from the back of the car, thus a necessity instruction was warranted. However, this act is not the basis of the count 3 offense and conviction. There was no testimony, either from Brenda or Williams, that the act of nudging or shoving Brenda away from the vehicle resulted in any injury, let alone serious bodily injury, and the prosecution did not rely on this act as the basis for the count 3 offense.

The count 3 offense charged Williams with willfully and unlawfully using force or violence on Brenda, resulting in the infliction of serious bodily injury (§ 243, subd. (d)). In closing argument, the prosecutor noted the offense required the infliction of "serious bodily injury" and argued that serious bodily injury was shown by loss of consciousness, concussion, bone fracture, and extensive bruising.

Brenda testified that after Williams nudged her roughly away from the back of the car, he struck her on the face, knocking her to the ground. Brenda "went down and hit the concrete with my head." Williams continued to hit her as she lay on the concrete. In addition to the head injury, Brenda suffered various bruises and cuts on her body and the injury to her arm. When Williams stopped hitting her, Brenda had difficulty getting up from the ground.

The loss of consciousness and serious bodily injuries occurred when Brenda was struck in the face, knocking her to the concrete, and then hit repeatedly while on the ground; not when she was nudged or shoved away from the back of the car.

Analysis

A trial court has a sua sponte duty to instruct on a defense if it is supported by substantial evidence and if it is not inconsistent with the defendant's theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 468-469.) A trial court is not required to instruct on theories that lack substantial evidentiary support. (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267.) The defendant has the burden of proving the defense of necessity

by a preponderance of the evidence. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 (*Heath*).)

In order to “justify an instruction on the defense of necessity, there must be evidence sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency.” (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 (*Pepper*).) “Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime.” (*Heath, supra*, 207 Cal.App.3d at p. 901.)

The defense of necessity, in contrast to the defense of duress, has traditionally covered situations where physical forces beyond the defendant’s control rendered illegal conduct the lesser of two evils. (*Heath, supra*, 207 Cal.App.3d at p. 899.) “The defense of necessity generally recognizes that ‘ “the harm or evil sought to be avoided by [the defendant’s] conduct is greater than that sought to be prevented by the law defining the offense charged.” ’ ” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100.)

The necessity defense is available to a defendant if the actions he or she intended to engage in, and did engage in, were unlawful. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 100.) The situation presented to the defendant must be of an emergency nature, threatening physical harm, and lacking an alternative legal course of action. (*People v. Weber* (1984) 162 Cal.App.3d Supp. 1, 5.)

Here, a necessity instruction was not warranted for two reasons: (1) Williams denied engaging in any illegal conduct, specifically, he denied hitting Brenda; and (2) Williams had adequate options available to avoid any perceived harm of being struck by Brenda with the vacuum wand.

Williams maintained at trial that he did not punch Brenda in the cheek or hit her while she was on the ground. Williams did not contend at trial he was forced to engage in illegal acts in order to prevent a greater wrong; he claimed he never engaged in the acts that constituted the basis of the count 3 offense and conviction. Williams's claim, if believed by the jury, was insufficient as a matter of law to establish the elements of the defense of necessity; there was no illegal act. Therefore, the instruction was not warranted. (See *Pepper, supra*, 41 Cal.App.4th at p. 1036.)

More importantly, Williams had numerous legal options available to him to prevent any perceived harm from Brenda hitting him with the vacuum wand. He had no need to strike Brenda to protect himself from harm or to defend himself, which precluded a defense of necessity. (*Pepper, supra*, 41 Cal.App.4th at p. 1035.) Williams could simply have walked away and left the vicinity, or if he felt further threatened could have called 911. Either one of these simple legal actions would have prevented any perceived harm from Brenda striking him with the vacuum wand.

For the same reasons the trial court was not required sua sponte to instruct on the defense of necessity, defense counsel was not ineffective for failing to request a necessity instruction. The evidence was insufficient to support such an instruction. As the appellate court stated in *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091, “[D]efense counsel is not required to make futile motions or to indulge in idle acts to appear competent.”

DISPOSITION

The judgment is affirmed.